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No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

FIDEICOMISO DE LA TIERRA DEL CAÑO MARTÍN PEÑA,
Petitioner,

v.

LUIS G. FORTUÑO, ANTONIO M. SAGARDÍA-DE JESÚS, MUNICIPALITY OF SAN JUAN, JORGE SANTINI, AUTORIDAD DE ENERGÍA ELÉCTRICA, AUTORIDAD DE CARRETERAS, ADMINISTRACIÓN DE TERRENOS,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a well-pleaded claim that private property was taken in violation of the Takings Clause under the mere pretext of a public purpose may be dismissed at the pleading stage simply because the government can advance in litigation a *post hoc* public purpose that appears facially valid?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all the parties to the proceeding before the United States Court of Appeals for the First Circuit:

The Fideicomiso de la Tierra del Caño Martín Peña was the appellant below.

The appellees below were: Luis G. Fortuño, Governor of the Commonwealth of Puerto Rico; Antonio M. Sagardía-De Jesús, the Secretary of Justice of the Commonwealth of Puerto Rico; the Municipality of San Juan; Jorge Santini, the Mayor of the Municipality of San Juan; the Autoridad de Energía Eléctrica; the Autoridad de Carreteras; and the Administración de Terrenos.

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OPINIONS BELOW

The opinion of the First Circuit (Pet. App. 1a-34a) is reported at 604 F.3d 7. The order denying the petition for panel rehearing or rehearing *en banc* (Pet App. 55a-56a) is unreported. The opinion of the United States District Court for the District of Puerto Rico (Pet. App. 35a-54a) is reported at 670 F. Supp. 2d 132.

JURISDICTION

The Court of Appeals for the First Circuit issued its decision on April 28, 2010. On June 3, 2010, the First Circuit denied petitioner's timely filed petition for rehearing or rehearing *en banc*. Justice Breyer extended the time for filing a petition for certiorari to October 31, 2010. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

This case involves the following statutes and regulatory provisions, which are set forth in full in the Appendix to the Petition (Pet. App. 57a-147a): Puerto Rican Law 489 of September 24, 2004, and Puerto Rican Law 32 of June 23, 2009, which amends a particular article of Law 489.

STATEMENT OF THE CASE

A. Factual Background

Home to about 30,000 people, the Martín Peña Canal District runs through the heart of San Juan, Puerto Rico. The district's residents live on land formed by filling in the mangrove swamp on the banks of a canal formerly owned by the Commonwealth of Puerto Rico and the Municipality of San Juan. Spurred by a dredging project that would improve the environmental conditions of the canal but potentially displace local residents, the Puerto Rico Transportation and Public Works Department and the Puerto Rico Highways and Transportation Authority launched the Martín Peña Canal ENLACE Project. The project's goal was to "rehabilitate and revitalize this district, protecting the permanence of these communities" while "creating the conditions for integrating them into the urban fabric of the city, offering its residents a dignified life and the appropriate environmental conditions for fostering the rehabilitation of the San Juan Bay Estuary." Pet. App. 60a.

Local residents participated in over 700 community meetings to assist in the creation of a formal development plan for the district. The issue of land ownership was a significant concern during the process, and numerous options were evaluated. Consensus was eventually reached on a community land trust model, under which a private nonprofit entity would collectively own the land and residents would retain surface rights to the parcels on which they lived.

In September 2004, the development plan agreed upon by the community, including the land trust model of ownership, was adopted by the Puerto Rico Legislature as Law 489. Pet. App. 57a. The law provides for the creation of ENLACE, a public entity responsible for implementation of development initiatives, and Petitioner Fideicomiso de la Tierra del Caño Martín Peña ("the Fideicomiso"), a private entity to act as collective landowner on behalf of the district's residents. Law 489 gives the Fideicomiso independent judicial personality and the power to own and acquire land. Under Article 16 of Law 489, public title to lands in the Martín Peña Canal District was transferred to ENLACE by operation of law 160 days after the date of Law 489's enactment. Article 19 empowers the Fideicomiso to acquire land transferred to ENLACE by operation of Article 16.

The Fideicomiso was formally constituted in late 2008 with the enactment of a general regulation governing its operation. By June 2009, it had properly acquired title to more than 200 acres of formerly public land.

On June 18, 2009, soon after a general election in which the New Progressive Party won control of the governorship and increased its majorities in both chambers of the Legislature, the Puerto Rico Legislature passed Law 32 "to amend Article 16 of Law Number 489 of September 24, 2004." Pet. App. 135a. The bill was signed into law on June 23, 2009. Law 32 explicitly provides that any land owned by the Fideicomiso but formerly owned by either the Municipality of San Juan or the Commonwealth of Puerto Rico will revert back to its original owner.

The law also requires that the Municipality, in conjunction with the Commonwealth, undertake the procedures and title studies necessary should the land be transferred to individual owners. The "Statement of Motives" set forth in Law 32 indicates that the law's purpose is "to conform the provisions of Section 16 of Act No. 489 to other laws of which the purposes are also matters of high public interest," and "to suppress the reference made to public domain properties, since these are not liable to being privately owned." Pet. App. 136a.

B. Procedural History

On June 25, 2009, Petitioner sued Respondents in the United States District Court for the District of Puerto Rico, seeking emergency injunctive relief from the effects of Law 32, as well as a declaratory judgment and a permanent injunction. The request for immediate relief was motivated by a public announcement by the Mayor of San Juan that, despite Law 32's statement that "public domain properties . . . are not liable to being privately owned," Pet. App. 136a, he intended to begin transferring the land to private individuals as soon as possible. The district court denied the request for emergency relief on June 29, 2009, and requested additional briefing on Petitioner's ability to own land and the issue of *Pullman* abstention. Petitioner filed an urgent motion later that day in an attempt to stop the Mayor from giving the Fideicomiso's land to private parties, a process which, according to local newspapers, he had already begun on Sunday, June 28, 2009. Pl.'s Mot. at 8, Civil No. 2009-1581 (D.P.R. June 29, 2009). In its motion, Petitioner showed that

it had been unambiguously granted independent judicial personality and the ability to acquire and own land under Puerto Rican law, making *Pullman* abstention inappropriate. On July 2, 2009, the district court denied Petitioner's second motion without explanation.

Petitioner appealed to the First Circuit on July 6, 2009. In their brief, Respondents emphasized that "elections have consequences" and that "Law 32 merely reflects representative democracy at work." Appellees' Br. at 73, No. 09-1911 (1st Cir. Aug. 31, 2009). Completely ignoring Law 32's statement that "public domain properties . . . are not liable to being privately owned," Pet. App. 136a, Respondents asserted that they were merely changing the means by which the goals of Law 489 would be achieved. They argued that a shift "from collective holding of the land to individual holdings of the land" was desirable because "empowering the individual will furnish economic and community development which yields better results." Appellees' Br. at 78, No. 09-1911. The First Circuit dismissed Petitioner's appeal without prejudice on September 17, 2009, on the ground that the district court had ruled only on the application for emergency relief and not on the request for a preliminary injunction. On November 10, 2009, the district court dismissed the case on the grounds of *Pullman* abstention and denied the preliminary injunction motion as moot. Pet. App. 35a.

Petitioner once again appealed to the First Circuit. This time, Respondents turned abruptly away from their previous emphasis on the benefits of

transferring Petitioner's land to private owners. They instead portrayed Law 32 as nothing more than a transfer of land from the Fideicomiso to other government entities better able to carry out community redevelopment due to "their many programs, services, initiatives and funds." Appellees' Br. at 103, No. 09-2569 (1st Cir. Feb. 18, 2010). Respondents stated that Law 32's enacted purpose "to suppress the reference to public domain properties, since these are not liable to being privately owned," was intended only as "a *de minimis* addition to merely emphasize that lands destined to the public domain, i.e. destined for public infrastructure or development projects, inter alia, cannot be privatized under any circumstances." *Id.* at 102 n.49.

On April 28, 2010, the First Circuit ordered that the case be dismissed with prejudice. Pet App. 1a. The court held that Petitioner had sufficient interest in the land in question to establish injury, and that *Pullman* abstention was not appropriate because Petitioner's claims could be resolved without regard to questions of Puerto Rican law. The court went on to hold that Law 32 took Petitioner's land in service of a satisfactory public purpose. It held that because Law 32 amended one article of Law 489, it was simply a different means to achieve the valid public purposes articulated by Law 489. It also emphasized that Law 32 itself undoubtedly fulfilled a public purpose because it transferred lands to public ownership, stating that "a federal court cannot conclude Law 32 was an illegitimate means of advancing a public purpose, not least because

transfers of private property to public ownership have been upheld since the founding of our country." Pet. App. 23a.

Ignoring this Court's explicit acknowledgement in *Kelo v. City of New London*, 545 U.S. 469 (2005), that the state may not take property under the pretext of a public use when its actual purpose is to bestow a private benefit, the First Circuit gave no weight to Petitioner's showing that the Respondents have continually shifted their explanation of how Law 32 meets the public use requirement and have both identified the private parties to whom they actually intended to give Petitioner's land and begun the process of transferring it. Instead, that court relied on Respondents' articulation of a new conceivable public purpose for Law 32 at oral argument, which purports to justify the taking on the ground that Petitioner has failed to make sufficient progress toward local redevelopment. This rationale, which Petitioner disputes, is the last in a series of unsatisfying justifications for Law 32 that Respondents have alternately embraced and disclaimed in order to present a pretextual "public purpose" that will allow them to take Petitioner's property for the benefit of private parties.

REASONS FOR GRANTING THE PETITION

In *Kelo v. City of New London*, 545 U.S. 469 (2005), this Court recognized that the Takings Clause protects property owners from takings "under the mere pretext of a public purpose." 545 U.S. at 478. In this case, the Fideicomiso made specific allegations that the Commonwealth of Puerto Rico

took its land without a legitimate public purpose and under the mere pretext of a public purpose. As part of a comprehensive, years-long development plan, the Fideicomiso – a private land trust – had obtained two hundred acres of land surrounding the Martín Peña Canal. Then a new political party took power and decided that it no longer wanted the Fideicomiso to own the land. The Commonwealth thus confiscated the Fideicomiso's land by statute. The Commonwealth's stated reasons for the taking are nearly incomprehensible, and have been rightly disclaimed in part by Respondents.

Upon the enactment of the challenged statute, the Mayor of San Juan, whose city was to obtain a substantial portion of the Fideicomiso's land, declared that he would start distributing the land to private parties as soon as possible. Respondents provided the courts below with conflicting and implausible reasons for the taking. Nevertheless, in reliance on the government's supposedly public purpose – demonstrably invented after the fact – the First Circuit ordered the Fideicomiso's complaint be dismissed.

This refusal to allow the Fideicomiso the opportunity to pursue its well-pleaded claim is in direct conflict with this Court's decision in *Kelo* and is inconsistent with the interpretation of *Kelo* by the highest courts of Hawaii and the District of Columbia. The First Circuit's error is also symptomatic of considerable confusion in the lower courts regarding the proper application of the pretext inquiry endorsed by *Kelo*.

By dismissing petitioner's pretext claim at the pleading stage on the sole ground that Respondents eventually came forward with a facially valid public purpose, the Court of Appeals effectively foreclosed any plaintiff in the First Circuit from pursuing a pretext claim. In the process, the Circuit deprived the Fideicomiso of the opportunity to litigate its well-pleaded constitutional challenge to the taking of the land it held in trust for some of Puerto Rico's most vulnerable citizens.

I. The First Circuit's Decision Conflicts With This Court's Decision In *Kelo* And With Decisions Of The Highest Courts Of The District Of Columbia And Hawaii

1. This Court has taught that a government may not take property "under the mere pretext of a public purpose." *Kelo*, 545 U.S. at 478. This is because a taking that "serve[s] no legitimate purpose of government . . . would . . . be void," *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984), and because "[i]t is well established that . . . the question [of] what is a public use is a judicial one," *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). Thus, the starting point for a court's analysis of a takings claim is, as both *Kelo* and *Vester* described it, the "actual purpose" of the taking. *Kelo*, 545 U.S. at 478; *Vester*, 281 U.S. at 446. "When the legislature's purpose is legitimate and its means are not irrational, [this Court's] cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts." *Midkiff*, 467 U.S. at 242-43; *accord Berman v. Parker*, 348 U.S. 26, 33 (1954) ("[T]he means of executing the

project are for Congress and Congress alone to determine, once the public purpose has been established.").

In *Kelo*, this Court explained that New London would not have been permitted to take petitioners' land if the city's "actual purpose was to bestow a private benefit." 545 U.S. at 478. As Justice Kennedy explained in his concurrence, "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual benefits, are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J. concurring). The Connecticut courts had concluded, and this Court agreed, however, that in *Kelo* "there was no evidence of an illegitimate purpose." *Id.* at 478. Rather, the record before this Court, developed by a seven-day bench trial in state court, demonstrated that the plan was not intended to benefit a private entity, but to improve the local economy. *Id.* at 478 n.6; *see also id.* at 492 (Kennedy, J., concurring) (relying on trial court's finding that primary purpose of the taking was economic development rather than a desire to benefit private parties). And, indeed, the development plan before the Court in *Kelo* was "comprehensive [in] character" and the product of "thorough deliberation." *Id.* at 484. The taking in *Kelo* "occurred in the context of a comprehensive development plan meant to address a serious citywide depression." *Id.* at 493 (Kennedy, J., concurring). Further, "[t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id.*

The Court explained, however, that an "unusual exercise of government power" – like the taking of one citizen's property to be transferred to another for the sole purpose of collecting increased tax revenues due to the second citizen's more productive use – "would certainly raise a suspicion that a private purpose was afoot." *Id.* at 487. Citing *Vester*, 281 U.S. at 448, the Court further noted that "[c]ourts have viewed such aberrations with a skeptical eye." *Id.* at 487 n.17; *see also id.* at 493 (Kennedy, J. concurring) (suggesting that where "the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible" a presumption of an impermissible motive might be warranted).

The aberration presented in *Vester* was the Cincinnati city council's failure to identify in any but "the most general terms" the purpose for the condemnation of land adjacent to a street-widening project. 281 U.S. at 443. The *Vester* Court thus found itself asked either to "assume that whatever the city, entirely uncontrolled by any specific statement of its purpose, may decide to do with the properties appropriated, will be valid under both the state and Federal Constitutions," or to choose a potential purpose "and decide for or against the taking accordingly, although the assumption may be found to be foreign to the actual purpose of the appropriation as ultimately disclosed and the appropriation may thus be sustained or defeated through a misconception of fact." *Id.* at 446. The Court rejected both possibilities, instead resting its decision on the conclusion that the taking violated

Ohio law because it failed to define the purpose of the condemnation, and holding that "[q]uestions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose." *Id.* at 449.

As in other areas of the law, then, proof that the government's stated reason for a taking is pretextual supports a finding that the taking lacked a legitimate public purpose. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."); *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring) ("If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish."). Indeed, the government's assertion of a reason for the taking other than the true one can be very persuasive proof that the government acted for an impermissible non-public purpose. *Cf. Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

2. In this case, however, the First Circuit adopted the rule that even well-pleaded allegations of pretext are insufficient to avoid dismissal so long as the government presents a facially valid public purpose

in the course of the litigation. The Fideicomiso clearly alleged that the reasons given by Respondents for the taking of the Fideicomiso's land cannot be believed, and raised a plausible claim that an illegitimate non-public purpose was afoot. Without even addressing the Fideicomiso's allegations, the Circuit held that the bare fact that Respondents put forth a facially valid public purpose for the taking required dismissal of the Fideicomiso's complaint. The First Circuit's rule prevents private parties like the Fideicomiso from vindicating their right to not have their land taken under the mere pretext of a public purpose.

The Fideicomiso's well-pleaded allegations demonstrate that the Legislature's contemporaneous statement of purpose for confiscating the Fideicomiso's land – which was incorporated by reference in the Fideicomiso's complaint – makes little sense, and has since been disclaimed in part by Respondents. The preamble and statutory statement of motives for Law 32 set forth two reasons for the taking: (1) "to conform the provisions of Section 16 of Act No. 489 to other laws of which the purposes are also matters of high public interest," and (2) "to clarify that public domain lands shall not be transferable" and "to suppress the reference made to public domain properties, since these are not liable to being privately owned." Pet. App. 136a. On appeal, Respondents disclaimed reliance on the second stated purpose. Respondents have never been able to explain what the first stated purpose means.

Whatever it means to harmonize Section 16 of Law 489 with "other laws of which the purposes are

also matters of high public interest," the Fideicomiso alleged a critical fact that raises a plausible inference that the Legislature lacked a legitimate public purpose: that the Mayor of San Juan, to whose city a substantial portion of the land confiscated from the Fideicomiso would revert, immediately "appeared publicly declaring that his intention is to provide land titles to private individuals." Compl. ¶ 4.35. The Fideicomiso alleged further that "the Municipality of San Juan has sent vehicles to the area with speakers exhorting citizens to communicate with a Municipal agency in order to [accelerate] the process."[1] *Id.*

For a time during this litigation, Respondents embraced the Mayor's land give-away as the public purpose animating the taking of the Fideicomiso's land. But by the time the case was presented on the merits to the First Circuit, Respondents had abandoned this reason too. Rather, on appeal, Respondents argued that the purpose of the taking was to kick-start economic development and environmental rehabilitation by giving the land back to experienced government agencies.

The hypothetical public purpose posited by Respondents' counsel is neither consistent with the facts alleged by the Fideicomiso – namely, that the stated intention of the Mayor was not to pursue public development of the land, but to give the land away to private parties as quickly as possible – nor

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[1] Indeed, within days of this announcement, a local newspaper reported that the Mayor had, in fact, already begun handing over property titles to private citizens. Pl.'s Mot. at 8, Civil No. 2009-1581 (D.P.R. June 29, 2009).

entitled to any sort of judicial deference. *See 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1130 (C.D. Cal. 2001) ("The idea of future blight simply embodies Lancaster's current litigation position; it is not supported by any evidence in the record. Accordingly, the Court need not defer to Lancaster's belated statement of public use."), *cited in Kelo*, 545 U.S. at 487 n.17; *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (observing that if governments could take property without a stated purpose and then "later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings."), *overruled on other grounds by, Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

The Fideicomiso alleged additionally that, in contrast to the careful planning and cooperative procedure by which the Fideicomiso obtained and managed its land, the taking effected by Law 32 was the product of "no discernible plan." Compl. ¶ 1.4. The Commonwealth's failure to develop any plan – let alone a comprehensive or considered one – provides further strong evidence that the taking lacked a legitimate public purpose. *See Kelo*, 545 U.S. at 478 (explaining that New London's taking was not pretextual in part because the taking was to be "executed pursuant to a carefully considered development plan" (internal quotation marks omitted)); *Western Seafood Co. v. United States*, 202 F. App'x 670, 675 (5th Cir. 2006) ("As in *Kelo*, the

City of Freeport seeks to develop its waterfront to revitalize a flagging local economy. The proposed taking of Western Seafood's property is the result of a carefully considered development plan."); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) ("Moreover, the United States Supreme Court placed great weight upon the existence of a 'carefully considered' development plan in order to rule that the taking in *Kelo* . . . was not pretextual, but for a proper purpose." (internal quotation marks omitted)).

Notwithstanding the Fideicomiso's substantial showing of pretext, the First Circuit's opinion disregarded this Court's decision in *Kelo* in according dispositive weight to Respondents' *post hoc* recitation of a conceivable public purpose. The First Circuit did not analyze the strength of the Fideicomiso's pretext claim. It did not address the Fideicomiso's allegations that the Mayor of San Juan publicly announced that once the city obtained the Fideicomiso's land, it would give the land away to private parties. Instead, the Court of Appeals took at face value Respondents' claim that the purpose of the taking was to have "public agencies . . . hold and administer the lands in the canal area." Pet. App. 22a. Under *Kelo*, the court should not have treated Respondents' incantation of a conceivable public purpose as dispositive in the face of the Fideicomiso's well-pleaded pretext claim. Although the First Circuit recognized that the Fideicomiso's claims that the taking at issue here "serves no legitimate purpose" were "serious arguments," the court departed from *Kelo* by holding that the Fideicomiso's

pretext allegations were "not grounds for a claim under the Takings Clause." Pet. App. 21a.

At the pleading stage, the court was bound to credit the Fideicomiso's non-conclusory factual allegations. Indeed, the standard for the dismissal of a takings claim under the Public Use Clause is the same as the dismissal standard in any other case: the plaintiff must allege facts that if true state a "plausible" claim that the taking lacked a legitimate public purpose. *Compare Kelo*, 545 U.S. at 491 (Kennedy, J. concurring) ("A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose."), *with Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face." (internal quotation marks omitted)). Thus, because the government cannot take property under the mere pretext of a public purpose, a court may not dismiss a takings claim that raises a plausible allegation of pretext.

3. The D.C. Court of Appeals and the Hawaii Supreme Court have properly recognized the governing principles laid out in *Kelo*, and the First Circuit decision is therefore also in conflict with the decisions of those courts.[2] As the D.C. Court of

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[2] This conflict is particularly significant given the leading role that state courts play in adjudicating takings claims. *See*

Appeals explained in *Franco v. National Capitol Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), a thoughtful opinion applying *Kelo* at the pleading stage, "*Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said." *Id.* at 169; *accord County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 644 (Haw. 2008) (holding that *Kelo* "make[s] it apparent that, although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual"). The *Franco* court explained that "the government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual." 930 A.2d at 169.

The First Circuit decision cannot be reconciled with these two decisions or with *Kelo* itself. The Fideicomiso may not ultimately succeed in proving that the taking of its land was without a legitimate public purpose, but under *Kelo* it should have been given the chance to try.

William A. Fletcher, Keynote Address, Kelo, Lingle, *and* San Remo Hotel: *Takings Law Now Belongs to the States*, 46 SANTA CLARA L. REV. 767, 776-78 (2006) (explaining that effect of recent takings cases is to transfer substantial authority over takings issues to state officials and state courts).

II. The First Circuit's Refusal To Allow Petitioner To Pursue Its Pretext Claims Is Symptomatic Of General Confusion Among The Lower Courts As To How To Adjudicate Pretext Claims In The Wake Of *Kelo*

Although *Kelo* made clear that the government may not take private property on the mere pretext of a public purpose, *Kelo* did not, of course, involve a viable pretext claim. Nor did *Kelo* define the term "mere pretext." *See Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007) ("Although *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext' . . . ."), *aff'd*, 516 F.3d 50 (2d Cir. 2008); *Franco*, 930 A.2d at 173 (observing that "the Supreme Court has not clarified the meaning of 'pretext'"). As a result, "[t]he decisions of the lower courts view [the] Court's opinion [in *Kelo*] through vastly different lenses, and no consensus has emerged about how to apply the Court's rules about pretext or comprehensive taking plans." Robert H. Thomas, *Recent Developments in Public Use and Pretext in Eminent Domain*, 41 URB. LAW. 563, 577 (2009); *accord* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 184-85 (2009) (surveying cases and observing that "[t]he current test for identifying whether a taking is 'pretextual' is less than clear").

In particular, a number of courts have questioned whether the concurrence in *Kelo* sets forth a standard for litigating pretext claims that is different from the standard contemplated by the majority

opinion. *Compare Goldstein v. Pataki*, 516 F.3d 50, 64 n.10 (2d Cir. 2008) ("[E]ven assuming, *arguendo*, we were to apply a version of Justice Kennedy's standard here, we would scrutinize objectively and find no 'plausible' accusations of favoritism."), *Western Seafood Co.*, 202 F. App'x at 675 (declining to resolve whether the "heightened standard" of scrutiny appellant perceived in Justice Kennedy's concurrence "is necessary in certain cases"), *and C&J Coupe*, 198 P.3d at 641-42 (Haw. 2008) ("declin[ing] to adopt Justice Kennedy's concurring opinion"), *with Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008) (treating Justice Kennedy's concurrence as an elaboration of the pretext inquiry referred to by the majority opinion). In *Franco*, the D.C. Court of Appeals observed that while the concurring opinion was not binding, it "may accurately predict what the Court will hold when the record before it does not resolve the pretext issue." 930 A.2d at 169 n.8.

Similarly, the lower courts have disagreed as to whether pretext claims may be brought only to challenge economic development takings. The Second Circuit has suggested that judicial scrutiny of the purported purpose of a taking is appropriate only where the "*sole* ground asserted for the taking [is] economic development." *Goldstein*, 516 F.3d at 64 n.10. The Hawaii Supreme Court, by contrast, held that it was "[p]lainly . . . not the intention . . . of the Supreme Court in *Kelo* to foreclose the possibility of pretext arguments merely because the stated purpose is a 'classic' one." *C&J Coupe*, 198 P.3d at 647. While recognizing that in the case of a classic

public use the "character of the proposed public use" could be strong evidence in "favor of the presumption of [the taking's] validity," *id.* at 643 n.32, the Hawaii Supreme Court held that under *Kelo* a claim of pretext could prevail "even where the government's stated purpose is a 'classic' one," *id.* at 648.

The First Circuit's rule that the existence of a facially valid public purpose requires dismissal of a takings complaint without regard to well-pleaded allegations of pretext is an extreme example of the more general confusion and uncertainty courts and commentators have encountered in attempting to apply the *Kelo* rule forbidding takings under the mere pretext of a public purpose. Despite widespread recognition – outside of the First Circuit – of the viability of pretext claims under *Kelo*, courts have divided on the nature of the pretext inquiry and the breadth of its applicability. This Court's guidance is necessary to safeguard private property rights and to ensure that clear, consistent rules are developed to govern the adjudication of pretext claims.

III. If Undisturbed, The First Circuit's Decision Will Effectively Foreclose All Future Pretext Claims And Will Dispossess A Community Land Trust Representing Some Of Puerto Rico's Most Vulnerable Citizens

Allowing the First Circuit's decision to remain in force will permit the taking of private property without any scrutiny of the taking's stated purpose. By treating Respondents' *post hoc* incantation of a public purpose as dispositive, the First Circuit

effectively foreclosed any claimant from bringing any pretext claim under any circumstances. The essence of a pretext claim is that the stated reasons for the taking are unworthy of credence. However, under the rule established by the First Circuit, the bare fact that the government can present a facially valid public purpose as part of its argument in litigation is sufficient for dismissal at the pleading stage, notwithstanding well-pleaded allegations that the purpose is a pretext. According to the First Circuit's decision, so long as attorneys representing the government can supply – after the fact – a conceivable public purpose, takings will proceed without scrutiny of the government's "actual" purpose.

In this case, the First Circuit's dismissal of Petitioner's properly raised takings claim will dispossess a community land trust representing the interests of some of Puerto Rico's least powerful citizens. The continued existence of the Fideicomiso land trust is of significant public interest and importance in Puerto Rico. It represents the culmination of years of collaboration between citizens and their government to address an issue central to community revitalization and environmental protection. The residents of the Martín Peña Canal District invested substantial time in working with government agencies to create a plan for collective land ownership that would foster community development without the risk of displacement. Law 32 destroys the careful balance struck by this process and eliminates the land ownership solution at the heart of the resulting

formal development plan. The First Circuit's decision denies Petitioner the right – recognized by this Court in *Kelo* – to protect itself against this arbitrary exercise of government power by proving that its land was taken under the mere pretext of a public purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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